George Rikos (SBN 204864)
THE LAW OFFICES OF GEORGE RIKOS
1307 Stratford Court
Del Mar, Ca 92014
Telephone: (858) 342-9161
Facsimile: (858) 724-1453
Email: george@georgerikoslaw.com

NICHOLAS & BUTLER, LLP
Craig M. Nicholas (SBN 178444)
Alex M. Tomasevic (SBN 245598)
225 Broadway, 19th Floor
San Diego, California 92101
Telephone: (619) 325-0492
Facsimile: (619) 325-0496
Email: cnicholas@nblaw.org
Email: atomasevic@nblaw.org

Attorneys for Plaintiff Bradley Van Patten

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BRADLEY VAN PATTEN, an individual, on behalf of himself and all others similarly-situated,

Plaintiff,

vs.

VERTICAL FITNESS GROUP, LLC a limited liability company;

Defendants.

CASE NO.: 12cv1614-LAB-MDD

CLASS ACTION

PLAINTIFF BRADLEY VAN PATTEN'S REPLY TO ADVECOR'S OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

The Honorable Larry A. Burns

I. INTRODUCTION

In its Opposition, Advecor confirms that there is really only one thing at issue in this simple case: whether class members gave "prior express consent" to Defendants to be blasted with over 80,000 texts. The answer again is "no," and, most importantly for this motion, the answer is "no" for everyone for the same reason. It is undisputed that no Defendant ever expressly disclosed to class members, orally or in writing, that Defendant would one day blast them with promotional texts. Certainly Vertical Fitness never disclosed to any class member that a *third party* – Advecor – would be given that member's personal contact information and blasted with texts. Nor did Vertical Fitness ever disclose it would be contacting members with an automatic dialer. Nor did Vertical fitness ever disclose to former Gold's Gym members, that even after they cancelled their Gold's Gym contracts, they would be solicited by a *different* gym long after they cancelled and ended their relationship with Gold's Gym.

Having nowhere else to turn, Advecor must rely on the exact same argument Vertical fitness does: that *all* class members gave *implied* consent to be contacted, in perpetuity, by whoever, for whatever purpose, by, and *only* by, providing their phone numbers to third parties for inclusion on membership applications. But "express" consent is the benchmark. Implied consent to an undisclosed third-party is insufficient. But even if this type of implied consent were sufficient, it would be sufficient for all class members at the same time, making class treatment ideal and justifying the granting of this motion.[1]

[1] Also pending before the Court, but not yet fully briefed, is Defendant Vertical Fitness' Motion for Summary Judgment which dives deeper into the "prior express consent" issue. Dkt. No. 43. One wonders why if both Defendants were so confident that consent by providing a phone number qualifies for "prior express consent" under the TCPA, that both Defendants would not *stipulate* to certification given that every class member, admittedly, provided phone numbers on their gym applications. There is no dispute as to how Vertical Fitness got the phone numbers.

II. THE MERITS OF DEFENDANTS' "PRIOR EXPRESS CONSENT" AFFIRMATIVE DEFENSE DO NOT PRECLUDE CERTIFICATION.

A. Advecor Misstates the Test.

In its Opposition, Advecor treats the "prior express consent" defense as a cure-all that purportedly defeats *all* of the Rule 23 certification requirements in one fail swoop. Because Advecor gets the defense wrong, the entire foundation for its opposition fails.

Advecor mis-states Plaintiff's burden. Advecor faults Plaintiff for allegedly not coming up with affirmative evidence that class members did *not* consent. As a threshold matter, that is not Plaintiff's job. "Prior express consent" is an affirmative defense that *Advecor* must prove, not Plaintiff. *Grant v. Capital Management Services, L.P.*, 2011 WL 3874877, at *1 n.1. (9th Cir. Sept. 2, 2011) ("express consent is not an element of a TCPA plaintiff's prima facie case, but rather is an affirmative defense for which the defendant bears the burden of proof"); *Connelly v. Hilton Grant Vacations Co., LLC*, 12CV599 JLS KSC, 2012 WL 2129364 (S.D. Cal. June 11, 2012).

In any event, Plaintiff *did* provide evidence of lack of consent. It is undisputed that texts were never actually discussed among the gyms and the members. Tomasevic Decl., Ex. 2, A. Berggren Depo. at 69:12-20. After handing off the members' private information, Vertical did not say anything about consent and Advecor did not think to ask about it. Tomasevic Decl., Ex. 1, Depo. of Advecor at 163:21 – 166:13 ("Consent was never discussed.") Further, members had no reason to assume they would be blasted with texts because never before had Defendant ever used texts to communicate. Tomasevic Decl., Ex. 2, A. Berggren Depo. at 71:10-72:12. This belies any argument that any (implied) consent could be "knowing" or "voluntary."

But most importantly, Vertical Fitness admitted in deposition that the *only* thing that it obtained from members, which it only now considers to be "prior express consent," is those members' phone numbers on a non-descript blank in a form membership application – a blank members were required to fill out – and a blank that not even Vertical's own executives, at that time, intended to be consent to receive text blasts. Tomasevic Decl., Ex. 3, Vertical Fitness Depo. at 75:5 – 78:21 (via John Barton); Tomasevic Decl., Ex. 2, A. Berggren Depo. at 69:12-20 (current Vice President who actually helped Mr. Van Patten and other class members fill out their membership applications never understood that members providing their phone numbers meant they were consenting to be blasted with sales texts); Tomasevic Decl., Ex. 4 (Van Patten membership agreement at the bottom of the first page tells prospective member they are not to sign the agreement until all of the blanks have been filled in). In short, Plaintiff presented evidence that *all* of the texts that were sent lacked the prior express consent or were "unauthorized."[2] Of course the real question – a question that is perfectly suited for class treatment – is whether filling in the phone number blank is or is not "prior express consent" as a matter of law.

On that question, both defendants read the "express consent" test too narrowly, in a way that is fundamentally at odds with controlling precedent. *Cf. Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009). In *Satterfield,* another TCPA texting case, the Ninth Circuit defined "express consent" under the TCPA as "[c]onsent that is clearly and unmistakably stated." *Satterfield*, 569 F.3d at 955; *citing* Black's Law Dictionary 323 (8th ed.2004).[3] Numerous district courts, including in this district, use the same definition. *Connelly,* 2012 WL 2129364, *4 (Hon. J. L. Sammartino) ("Hilton has failed to explain how the mere registration of a cellular telephone number at the time of booking a hotel

[2] By using "unauthorized" in his class definition, Mr. Van Patten means lacking prior express consent.

[3] All major legal dictionaries define "express" or "express consent" similarly. Barron's Law Dictionary, 176, "EXPRESS" (3d ed. 1991) ("to make known explicitly and in declared terms. To set forth an actual agreement in words, written or spoken, which unambiguously signifies intent. As distinguished from "implied" the term is not left to implication or inference from conduct or circumstances…"); Ballentine's Law Dictionary, 441, "EXPRESS" ("Adjective: Stated, explicit, clear; declared; not left to implication") (3d ed. 1969).

reservation constitutes prior express consent for the telephone calls at issue"); *Ryabyshchuk v. Citibank (S. Dakota) N.A.*, 11-CV-1236-IEG WVG, 2011 WL 5976239 (S.D. Cal. Nov. 28, 2011) (Hon. I. E. Gonzalez) (citing *Satterfield*); *In re Jiffy Lube Int'l, Inc., Text Spam Litig.*, 847 F. Supp. 2d 1253, 1259, n.7 (S.D. Cal. 2012) (Hon. J. T. Miller) ("[t]he court notes that even if it were to take judicial notice of the invoices [where plaintiffs previously volunteered their phone numbers], it is not persuaded that a customer's provision of a telephone number on the invoice in question would constitute prior express consent. Heartland's citations to FCC documents are not particularly convincing, and it is doubtful that Plaintiffs' alleged consent was 'clearly and unmistakably stated.'").[4]

Moreover, even *if* providing phone numbers on membership agreements was relevant, class members in this case provided their phone numbers to individual gyms, which are owned by different entities and *not* Vertical Fitness. *Id.* at 18:11-19; Tomasevic Decl., Ex. 3, Vertical Fitness Depo. at 31:7-17 (Vertical Fitness does not have an ownership interest, indirect or otherwise, in all of the gyms it promotes), Tomasevic Decl., Ex. 3, at 38:20-24 (each gym is "their own independent entity"). The members also never consented to or knew they could be auto-dialed by machines trying to sell them memberships. Also, the name "Vertical Fitness" appears nowhere on anyone's membership agreement. Tomasevic Decl., Ex. 4 (Mr. Van Patten's membership agreement); Ex. 5 (similar but newer form agreement). Nor does the word "Advecor" appear anywhere. *Id.* Both Vertical Fitness and Advecor are and were undisclosed promoters.

The former members like Mr. Van Patten, finally, have an even stronger

[4] Recently, in *Lusskin v. Seminole Comedy, Inc.*, the Southern District of Florida held that the phrase "prior express consent" as used by Congress in the TCPA was so clear that it refused to give *Chevron* deference to arguably contrary FCC Declaratory rulings. *Lusskin,* 12-62173-CIV, 2013 WL 3147339, *3 *et seq.* (S.D. Fla. June 19, 2013) ("Lusskin's admission that he provided his cell number to Seminole Comedy as part of the online ticket purchase does not mean that, as a matter of law, he consented to receive promotional text messages by Seminole Comedy through an automatic dialing system).

argument for two reasons: first, by virtue of being "former" members, their business with the gyms ended. All terms of membership were cancelled, including any purported (implied) agreement to be contacted by the gyms for gym business (much less: sales calls). Second, the former members all signed agreements with, and gave their phone numbers to different gyms ("Gold's Gym"), which Defendant itself takes pains to distinguish itself from. Tomasevic Decl., Ex. 3; Tomasevic Decl., Ex. 3; Vertical Fitness Depo. at 41:13-20, and Ex. 3 at 17:16-18:6 (Gold's Gyms and Xperience Fitness Gyms are actually and conceptually different gyms). In short, *no* class member gave consent to "Vertical Fitness" or "Advecor," let alone "clear" and "unmistakable" "express" consent to be blasted in perpetuity, by Vertical Fitness or Advecor, and with no limit on number or type of contact. Plaintiff will prevail at trial even under Defendants' own definition.

Defendant does not point to single instance where a putative class member ever expressly, clearly, or unmistakably gave prior express consent to receive promotional text blasts from Vertical Fitness or from Advecor. What Defendants offer instead is an after-the-fact *inference* of *implied* consent, which does not qualify.

Advecor's purported gym member form declarations, even if admissible,[5] make no difference. *None* of the form declarations even mention the phrase "prior express consent." At best, the purported declarants want to interject their legal opinion as to what they think satisfies Congress' definition of "prior express consent." Or they say that *today* they do not believe that some un-described text they received from some un-described gym was "unauthorized." But what a text recipient believes, in hindsight, about his or her text is not relevant under the body

[5] *See* Plaintiff's Objections to Advecor's Evidence filed concurrently with this Reply. For example, the hopelessly vague and foundationless nature of the purported declarations makes it hard to tell if these declarants – whose identities have never been disclosed by Vertical Fitness - are even class members in the first place, or if they are, whether they received the current member blast or the former member blast, or something else. Also, the purported declarants, even if we assume they are actually class members of some kind, constitute less than 0.02% of all text recipients – hardly a representative sample.

of law we are concerned with. The TCPA requires *prior* consent that is *express*. Indeed Defendants broke the law when they *sent* the texts without such consent. *See Lee v. Stonebridge Life Ins. Co.*, 289 F.R.D. 292, 295 (N.D. Cal. 2013). The declarants cannot un-break the law. None of the declarations establish or refute the TCPA's basic elements. These declarants' after-the-fact opinions are simply irrelevant.

Finally, the Honorable Court should decline Advecor's invitation to ignore cases in this Circuit (even in this District), and to adopt the reasoning of the Northern District of Alabama in *Pinkard*. *See Pinkard v. Wal-Mart Stores, Inc.*, No. 3:12-cv002902-CLS, 2012 WL 5511039 (ND. Al. Nov. 9, 2012). First, *Pinkard* is distinguishable. There, Ms. Pinkard had voluntarily provided her phone number directly to Walmart, who then, itself, sent Ms. Pinkard texts. Here, neither Mr. Van Patten nor any other class member provided their phone numbers to this Defendant – they provided them to other entities and Vertical Fitness subsequently compiled their info and gave it to Advecor. The *former* members, furthermore, provided their numbers to different gyms ("Gold's") and had all since cancelled their contracts with their gyms, thereby revoking any implied consent - assuming, arguendo, any was given in the first place.

Second, *Pinkard* misreads *Satterfield* to the extent it thinks *Satterfield* found consent by merely volunteering a phone number. That cannot be squared with *Satterfield's* definition of "express consent," which requires "clear" and "unmistakable" consent. Important in *Satterfield*, furthermore, was that the plaintiff also checked a box that said "*Yes! I would like to receive promotions from Nextones affiliates and brands*" *Satterfield*, 569 F.3d at 949, 955. The whole case turned *not* on the act of providing phone numbers, but on that check-box language and whether or not the text sender was a "Nextones affiliate[] or brand." *Id.* at 955. In short, the *Satterfield* panel looked deep into what actually was *expressed* by the parties' agreement: what was expressly agreed to and disclosed and what was not.

Defendants cannot survive the same scrutiny in this case.

In short, *Pinkard* cannot be squared with the facts of this case or with the Ninth Circuit's opinion in *Satterfield.* Rather than *Pinkard*, this Court should look to *Connelly*, 2012 WL 2129364; *Ryabyshchuk*, 2011 WL 5976239; *In re Jiffy Lube Int'l, Inc., Text Spam Litig.*, 847 F. Supp. 2d 1253; *Agne v. Papa John's Intern. Inc.*, 286 F.R.D. 559 (W.D. Wash. 2012) (discussed further *infra*) and all other cases that correctly honor the common-sense and plain requirements of the TCPA and its "prior express consent" defense.

B. Even Defendant's Re-Formulated and Restrictive "Express Consent" Test is No Barrier to Certification.

For purposes of *this* motion, the Court need not wade into what is or is not "express consent." The express consent affirmative defense is a merits issue that "whatever its validity, does not defeat commonality." *Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 686 (S.D. Fla. 2013) ("On this defense, all class members will prevail or lose together"); *Landsman & Funk PC v. Skinder–Strauss Assocs.*, 640 F.3d 72, 74 (3d Cir. 2011) (consent "could be understood as a common question").

Here, Advecor agrees with Vertical Fitness that there are only two possible outcomes: that gym applicants either provided "express consent" by simply supplying their phone numbers to the gyms, or they did not. Because *all* class members filled out *largely identical* paperwork and, admittedly, provided phone numbers; and because Defendant can point to no additional relevant factors bearing on the consent issue, all of the class members are going to prevail or lose on this issue *together*. The "express consent" defense actually *proves* commonality, typicality, and "predominance."

Manno, another TCPA case, is instructive. *Manno*, 289 F.R.D. at 686. There, Defendant was a debt collector trying to collect unpaid hospital charges. *Id.* at 679-80. To collect, the defendant called Manno on his mobile phone using a prerecorded message. *Id.* Like Defendants do here, the *Manno* defendant argued that "the mere act of tendering a phone number to a [hospital] admissions clerk at the time of medical care constitutes consent *per se*." *Id.* at 686. The Court held, though, that whatever the "validity" of this defense, it "does not defeat commonality:"

> To the contrary, the argument is itself subject to common resolution. Whether the provision of a phone number on admissions paperwork equates to express consent is a question common to all class members, because all class members filled out paperwork at the time of treatment. On this defense, all class members will prevail or lose together, making this another common issue to the class.

Id. Here, all parties at least agree that the question of "express consent" is an important one that applies to everyone. The eventual *answer* to that question will be the same for Mr. Van Patten and all of his class members because that answer depends on common, if not identical, factors (undisputed form contracts and the undisputed supplying of phone numbers). *Cf. Wal-Mart Stores v. Dukes,* 131 S.Ct. 2541, 2551 (2011) (a key focus is "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation") (emphasis in original). Thus, this case is ideal for class treatment. *Cf. Agne v. Papa John's Intern. Inc.,* 286 F.R.D. 559, 567- 68 (W.D. Wash. 2012) (granting certification, treating as just another common question Defendant's contention that supplying phone numbers as part of a prior pizza transaction constituted express consent, and noting that: "Defendants offer only a bare assertion of individualized issues of consent, unsupported by a single document showing that [Defendants] ever obtained or documented such consent from any putative class member".)

III. ADVECOR'S REMAINING CHALLENGES ALSO FAIL.

A. Whether a Party was "Charged" is also a Non-Issue.

Advecor, in one paragraph, also claims that the issue of whether a party was "charged" for the call presents insurmountable certification problems. Advecor

Oppo. at 12:4-14. Advecor presumes that liability under the TCPA requires a charge *for the particular text message.* That is wrong. *Agne,* 286 F.R.D. at 570-71 ("The Court rejects the legal foundation for Papa John's argument that individualized issues regarding whether recipients were charged for the text message advertisements will overwhelm common questions… the TCPA does not require plaintiffs to show that they were charged for text message advertisements sent to their cellular phones"); *Gutierrez v. Barclays Group,* No. 10–CV–1012–DMS, 2011 WL 579238, at *5-6 (S.D.Cal. Feb. 9, 2011); *Smith v. Microsoft Corp.*, No. 11–CV–1958 JLS–BGS, 2012 WL 2975712, at *5 (S.D. Cal. July 20, 2012) (the TCPA "does not limit protection to instances in which a plaintiff is charged individually, or even incrementally, for each text message"). Defendant again invents an issue that does not exist. No class member will ever have to prove individual charges. And in reality, *all* text recipients, including Mr. Van Patten pay for their texts, whether they pay a flat fee or otherwise. Texts are not free. Moreover, Defendant's abuse of the airwaves and blasting of tens-of-thousands of mass texts raises *everyone's* text charges, thereby actually damaging everyone whether they know it or not. *See* Declaration of Randall Snyder. This is no barrier to certification.[6]

B. Mr. Van Patten is an Adequate Representative.

Unable to muster a real conflict of interest, Advecor launches an attack on Mr. Van Patten's character. First, Advecor claims Mr. Van Patten lied, in his original complaint, about not having a membership with Gold's or Xperience Fitness gyms. The facts are that Mr. Van Patten cancelled any would-be membership during a 3-day no-cost cancellation period. Tomasevic Decl., Ex. 3, Vert. Fitness Depo. at 129:5-12.*; see also* Tomasevic Decl., Ex. 4 (Mr. Van Patten's

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[6] The TCPA's reference to "charged" was meant only to exempt things like "those calls made by cellular carriers to cellular subscribers (as part of the subscriber's service) for which the called party is not charged," like when your carrier warns you that your bill is due or that you are about to go over your data allotment. *See Gutierrez*, 2011 WL 579238, at *5-6 (the verbiage "does not, as Defendant suggests, apply to all calls for which the party is not charged").

Membership Agreement, Terms of Cancellation). Mr. Van Patten never even checked into his gym after signing up. *See* Tomasevic Decl., Ex. 3, Vert. Fitness Depo. at 129:5-130:15. It is debatable whether or not someone, under those circumstances, could actually be considered a "member" of a gym. In any event, Mr. Van Patten corrected the issue and left that sentence out of the First Amended Complaint, the operative one. Dkt. No. 28, ¶ 23.

Next, Advecor takes another run at the "no-charge" argument by claiming that Mr. Van Patten did not have to pay for the spam texts at issue, contrary to what is in his complaint. Again, the fact is that Mr. Van Patten paid and pays for *all* texts. But for Mr. Van Patten paying an amount – albeit a flat amount – Mr. Van Patten would not receive any texts, spam or otherwise. Texts are not free. In any event, Advecor does not cite a single case that says semantics can disqualify an otherwise ready, willing, able, and committed class representative. *Cf.* Van Patten Decl., ¶¶ 3-5 (outlining Mr. Van Patten's efforts and commitments to this case) (filed with original motion). Mr. Van Patten is an adequate representative.[7]

Finally, and like Vertical Fitness did, Advecor complains that Mr. Van Patten is *too experienced*. It is true that Mr. Van Patten has been injured in the past and has done something about it. But the key question here is whether Mr. Van Patten and his counsel can "prosecute the action vigorously" on behalf of the class. *In re Mego Fin'l Corp. Secur. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000). That Mr. Van Patten may have tried to be a class representative in the past only shows that he is well-versed in the time commitments and other responsibilities of a class representative. *Cf. Murray v. GMAC Mortg. Corp.* 434 F3d 948, 954 (7th Cir. 2006) ("[r]epeat litigants may be better able to monitor the conduct of counsel, who as a practical matter are the class's real champions."). Mr. Van Patten is more than just adequate and Advecor presents no real evidence to the contrary.

[7] At no point does Advecor challenge the adequacy of Mr. Van Patten's chosen counsel.

IV. CONCLUSION

Mr. Van Patten has satisfied all of the Rule 23 requirements for certification. This Court should certify a class of: "all persons in the United States and its Territories who were sent one or more unauthorized text message advertisements on behalf of Defendant" and should appoint Mr. Van Patten's counsel as class counsel.

DATED: September 27, 2013 Respectfully submitted,

/s/ Alex Tomasevic